IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1931.

No. 252

JOSIAH T. ROSE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA,

Petitioner,

vs.

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA,

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The respondent, in opposition to the granting of the Writ prayed for by Petitioner, begs leave to present to the attention of this court the following facts as reasons why the writ should not be allowed.

STATEMENT.

Respondent submits the following as its conception of an accurate statement of the case (R. 1-17):

It is a Florida corporation and manufactured at its factory in Jacksonville, Florida, a product known as Southern Nut Product, which consisted of coconut oil, peanut oil, salt, water and coloring matter (R. 2). Petitioner seeks to collect from respondent's dealers in the State of Georgia the annual special license tax of $480 from wholesalers and $48 from retailers of the product as a special tax on the sale of artificially colored oleomargarine.

An identical product, known as Nut-Z-All, manufactured and sold by the Higgins Mfg. Co. of Providence, R. I. had been held not to be oleomargarine by Judge Brown of the District Court of Rhode Island, decided April, 1924 (*Higgins* v. *Page*, 297 Fed. 644, R. 3). The Government did not appeal the case, but disseminated the court's decision in the form of a treasury decision, T. D. 3590 (R. 4). The Commissioner of Internal Revenue informed oleomargarine manufacturers that such products were not taxable as oleomargarine (R. 4, 5).

Other identical products came on the market and the attempt of the revenue department to tax them as oleomargarine by T. D. 4006 (R. 5) was enjoined by Judge Lowell in the District Court of Rhode Island, July, 1927 (*Higgins* v. *Page*, 20 Fed. (2d) 948) (R. 6, 7), and Justices Bailey and Hoehling of the Supreme Court of the District of Columbia (Opinion unpublished, R. 8, 9).

Respondent then sought permission of the Commissioner of Internal Revenue to manufacture an identical product under the trade name of Southern Nut Product, and was informed by letter that it had the same right to manufacture

such a product tax-free as those manufacturers who had received favorable court decisions (R. 10). Respondent proceeded to manufacture and sell Southern Nut Product. Judge Barrett of the District Court of the Southern District of Georgia held in a state case (*Baltimore Buttermilk Co.* v. *Talmadge,* 32 Fed. 2, 904, May, 1929) that Southern Nut Product was not an imitation of butter (R. 10, 11).

The Collector of Internal Revenue at Jacksonville, Florida, attempted to tax Southern Nut Product as oleomargarine, and in March, 1930, was enjoined from so doing by Judge Jones of the District Court of Florida (R. 12, 13). The Commissioner of Internal Revenue did not believe such products taxable as oleomargarine and so informed Congress. Congress did not believe such products taxable and amended the oleomargarine law to include such products, such amendment to become effective July 10, 1931. (*Miller* v. *Standard Nut Margarine Co. of Florida,* 49 Fed. (2d). 79).

Notwithstanding all these facts, petitioner, Collector of Internal Revenue for Georgia, attempted to compel respondent's dealers in Georgia to pay license taxes as dealers in artificially colored oleomargarine (R. 13). Rather than pay such an unreasonable and exorbitant demand, such dealers refused to handle Southern Nut Product, and respondent's valuable business in that state was threatened with destruction. The bill for injunction herein was filed in the District Court for the Northern District of Georgia, but the injunction was refused by the District Court relying upon R. S. 3224, but that court did grant an injunction pending appeal. The court expressed no opinion as to whether the product was oleomargarine but relied entirely upon the prohibition of the statute. The decision of the District Court refusing injunctive relief was reversed by the Circuit Court of Appeals of the 5th Circuit (49 Fed. (2d) 85). It is this decision that petitioner seeks to have reviewed.

Comment Upon Petition.

Petitioner appears to have missed the point in this case and to have proceeded upon the theory that respondent is the "taxpayer" (See third word under Statement, p. 3 Petition), and that "this action was brought to restrain the collection of any further tax on Southern Nut Product" (p. 4, Petition).

This is not the situation. Respondent was *not* the taxpayer and there was no prayer to restrain the collection of any tax against it or its product, Southern Nut Product. Respondent sought to restrain the revenue officials from destroying its business in Southern Nut Product in Georgia, such destruction being accomplished by the said officials endeavoring to force respondent's dealers in Georgia to pay a license tax for the privilege of dealing in Southern Nut Product as upon dealers in artificially colored oleomargarine. The question as to whether Southern Nut Product was oleomargarine was not decided by the District Court.

Questions Presented.

The question, as respondent views it, is:

> *Is a District Court regardless of circumstances (extraordinary and exceptional or otherwise) prohibited by Sec. 3224 R. S. from restraining revenue officials from attempting the collection of a levy in the guise of a license tax upon wholesale and retail dealers in respondent's Southern Nut Product in the State of Georgia,*

when similar officials in the State of Florida have been enjoined by the District Court there from attempting to collect a levy under the guise of a manufacturers tax upon the same product under the same law; the court (Georgia) finding that respondent had a property right in Georgia, the destruction of which a court of equity might protect, and also that respondent had no adequate remedy at law, and that

the damage would be incapable of computation, (R. 38) respondent not being the taxpayer and being unable to comply with R. S. 3226 by paying the levy and suing to recover it back?

Respondent presents that the only question for consideration by the court is as to whether the circumstances as described constitute such exceptional and extraordinary circumstances under prior decisions of this court as to constitute an exception to R. S. 3224. *Hill* v. *Wallace,* 259 U. S. 44, 66 L. Ed. 822. *Bailey* v. *George,* 259 U. S. 16, 66 L. Ed. 816; *Dodge* v. *Brady,* 240 U. S. 122, 60 L. Ed. 560.

We direct this court's attention to the Memorandum in Opposition to the Petition for Writ of Certiorari filed in the case of *Peter H. Miller, Collector* v. *The Standard Nut Margarine Co. of Florida, Respondent,* No. 251, filed herewith, and point out that in addition to all the reasons there given in opposition to the writ and believed to constitute extraordinary and exceptional circumstances, the additional reason that in this case respondent is not the taxpayer and that petitioner was proceeding in defiance of a decision of the District Court of the Southern District of Florida which has enjoined similar officials there and which decision was at the time being appealed by the Government.

We present that the Circuit Court of Appeals did not err in holding that extraordinary and exceptional circumstances existed which constituted an exception to R. S. 3224 and that the petition should be denied.

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